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No. 98-1206

IN THE

# Supreme Court of the United States

RALPH R. MABEY, Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc., AMERICAN COMMERCIAL TERMINALS LLC, WESTERN FUELS ASSOCIATION, INC. and TRITON COAL COMPANY LLC,

*Petitioners,*

*vs.*

SOUTHWESTERN ELECTRIC POWER COMPANY and THE COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## FURTHER REASONS FOR GRANTING THE WRIT

## I.

## RESPONDENTS' PROCEDURAL OBJECTIONS ARE WITHOUT MERIT.

### A. The Petition was Timely.

Unless the time is altered by local rule or order, petitions for rehearing in the court of appeals must be filed within 14 days after the date of entry of judgment. Fed. R. App. P. 40(a)(1). The court of appeals' judgment was entered on August 11, 1998. The petition for rehearing was filed on August 25, 1998. The petition was timely.[1]

In arguing that Petitioners were late, Respondents confuse "mandate" with "judgment," and Fed. R. App. P. 40 with 41. No rule or order shortened the time to file a petition for rehearing in this case. Even though the mandate issued "forthwith," the time to petition for rehearing remained the same. *United States v. DiLapi*, 651 F.2d 140, 144 and n.2 (2nd Cir. 1981), *cert. denied sub nom*, 455 U.S. 938 (1982).

The court of appeals' ultimate treatment of the petition for rehearing as one to recall the mandate does not change this result. *Id.* Issuance of the mandate only allowed the courts below to proceed with the case; it did not truncate Petitioners' right to seek certiorari.

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1. The United States timely filed motions for rehearing and suggestions for rehearing en banc on September 25, 1998, within the 45 day period allowed the government.

### B. Petitioners Raised the Absolute Priority Rule Below.

Respondents falsely claim that Petitioners raised the absolute priority rule "for the first time before any court" in their petition for rehearing.[2] (Respondents' Opp. at 9.) As the court of appeals noted, Petitioners asserted in the bankruptcy court that the SWEPCO Payment violated the " 'Bankruptcy Code's provision respecting the rights of secured creditors and the priority of payments to creditors established by the Code.' " (App. A at 14a.) Although the bankruptcy court failed to rule on the absolute priority issue, the district court did so rule (App. C at 49a-50a, 57a), as did the court of appeals.

If Respondents are complaining that Petitioners raised this specific absolute priority argument first in the petition for rehearing and now before this Court, Petitioners could not have known until the court of appeals ruled that it would find that the funds at issue were not paid "on account of" the members' claims. That ruling was never made by the bankruptcy court, and *a fortiori* by the district court, which reversed the bankruptcy court's decision.

## II.

## THIS COURT'S *LASALLE* DECISION REJECTED THE READING OF "ON ACCOUNT OF" ADOPTED BY THE COURT OF APPEALS BELOW.

We no longer need guess whether the Court's decision in *Bank of Am. Nat'l. Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 1999 U.S. LEXIS 3003 (May 3, 1999) could affect the resolution of the matters at bar, because the Court has now decided *LaSalle*. Therein, the Court read the phrase

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2. Respondents made this same argument before the district court. Petitioners carefully showed the district court and Respondents where in the record the arguments were raised before the bankruptcy court.

" 'on account of' " as meaning " 'because of[,]' " not " 'in exchange for' " or " 'in satisfaction of.' " *Id.* at *31. Thus, "a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the rule." *Id.* at *31.

In its reading of the absolute priority rule, the court of appeals below applied the discredited meaning "in satisfaction of" to the phrase "on account of."[3] The court of appeals reached this result in two steps. First, it ruled that the SWEPCO payments to members did not violate 11 U.S.C. § 1123(a)(4), which forbids disparate treatment of similarly situated creditors, because "the payments were made not in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case." (App. at 33a.) The court of appeals then stated that for the same reason, *viz.*, the funds were not paid in satisfaction of the members' claim, the funds ***also*** were not paid " 'on account of [the CCM members'] [unsecured] claim[s] or [their equity] interest[s].' " 11 U.S.C. § 1129(b)(2)(B)(ii). (App. A at 34a.)

Thus, the effect of the court of appeals' absolute priority ruling is that a bidder for estate assets may pay whatever it wants to equity, creditors or other stakeholders, provided only that payment is not characterized as a payment in satisfaction of claims or interests.[4] This ruling is based on a discredited interpretation of the meaning of "on account of" and is thus inconsistent with the Court's opinion in *LaSalle*.

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3. Indeed, the *LaSalle* Respondent cited the court of appeals' decision below, urging that the decision "support[ed] Respondent's argument . . . that 'on account of' in 11 U.S.C. § 1129(b)(2)(B)(ii) means 'in satisfaction of.' " Supplemental Brief of Respondent, 1997 U.S. Briefs 1418, *1 (October 15, 1998).

4. The SWEPCO Respondents argument that if 11 U.S.C. § 1129(a)(4) applies, it preempts the application of 11 U.S.C.

(Cont'd)

Both the SWEPCO Respondents and the United States misapprehend petitioners' arguments concerning the "absolute priority rule." This is not a "new value" case. Indeed, the essence of this case is that the members, who are the equity in this case, received $1 million ahead of senior creditors, "on account of" or "because of" their status as equity, for ***no*** value.[5]

Finally, both SWEPCO Respondents and the United States inaccurately frame the procedural posture of this case. The SWEPCO Respondents have now proposed a new plan of reorganization, under which these very same absolute priority issues arise. Although the voting has not yet occurred on this plan, it is virtually certain that the classes of unsecured

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(Cont'd)

§ 1129(b) (Respondents' Opp. at 19), is not supported by the plain reading of the statute. If payments of "costs and expenses" under § 1129(a)(4) were exempted from § 1129(b)(2)(B)(ii), then the statute would clearly say so by referencing payments under § 1129(a)(4) as an exception. The statute provides, however, for **no** exceptions. A consistent reading of the statute leads to the conclusion, rather, that a payment may fit under both §§ 1129(a)(4) and (b)(2)(B)(ii) by allowing the retention or receipt of property (including payment of costs and expenses) by junior creditors or equity only in compliance with the absolute priority rule, and, if such property is in the form of costs and expenses, by allowing its retention or receipt only in the amount that is also determined to be "reasonable."

5. The United States' opposition reveals a misunderstanding of the issues and a lack of attention to detail. The United States claims that SWEPCO's counsel was disqualified for a conflict of interest. (U.S. Opp. at 3-4.) It was the members' counsel, not SWEPCO's counsel, who suffered disqualification. Similarly, against application of the "absolute priority rule," the government argues that "the present case does not involve any contribution of sweat equity by Southwestern. . . ." (U.S. Opp. at 10.) Southwestern is not the equity here. It is a bidder. The members are the equity who received payment ahead of senior creditors.

creditors will reject the plan because the Unsecured Creditors Committee has stated that it will recommend an unsecured creditor vote against the plan, and because SWEPCO projects that distributions to unsecured creditors under the new SWEPCO plan will be 3% to 16.5% of creditors' claims while the competing new plan of the Trustee will pay unsecured creditors in full with interest or in accordance with settlements reached.[6] Thus, the $1 Million Payment and the absolute priority rule issues it raises remain critical considerations in the ultimate resolution of this case.

If the Court is not inclined to grant certiorari to decide this case, Petitioners respectfully submit that the Court should grant certiorari, vacate the court of appeals' decision, and remand for consideration in view of *LaSalle*.

## III.

## THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH *KNIGHT*.

The United States argues that the court of appeals' decision is merely "in tension with the principles underlying this Court's decision in *United States v. Knight*, 336 U.S.

6. Certain statements in the SWEPCO Respondents' brief about the Trustee's prior plan of reorganization require correction. The Trustee's prior plan did not try to bind the members "without their consent to new contracts." (Respondents' Opp. at 2.) The Trustee's Plan tried to assume the existing all-requirements contracts of the members under 11 U.S.C. § 365. Further, contrary to SWEPCO Respondents' implications (Respondents' Opp. at 9), the bankruptcy court never found that the Trustee's prior plan was not proposed in good faith. Rather, confirmation was denied based on the bankruptcy court's conclusion that the proposed assumption of the all-requirements contracts violated Louisiana cooperative law, and, based solely on this conclusion, the bankruptcy court found that the plan was proposed by a "means forbidden by law" under 11 U.S.C. § 1129(a)(3).

505 (1949)." (U.S. Opp. at 8-9.) Direct conflict, not "tension," is at issue here.

The United States notes: "The court of appeals here did not question the applicability of the Bankruptcy Code's payment scheme to all assets found to be part of the bankruptcy estate. It simply concluded that the $1 million payment did not fall into that category." (U.S. Opp. at 8, n.7.) And therein lies the rub. Under *Knight*, "[a]ll the consideration which is paid for a bankrupt's assets becomes part of the estate. No device or arrangement, however subtle, can subtract or divert any of it." 336 U.S. at 508. It begs the question to say that this case is distinguishable from *Knight* because the funds did not belong to the estate in the first place.[7] In fact, contrary to *Knight*, the court of appeal's decision sanctioned a "device or arrangement" to divert "consideration which is paid for a bankrupt's assets" from the estate.

Further, contrary to the suggestions of both the SWEPCO Respondents (Respondents' Opp. at 13) and of the United States (U.S. Opp. at 10), whether the payments were made with a "benign" motive or a malevolent intent is irrelevant under *Knight*. The facts relied on to distinguish *Knight* (which go to motive and purpose) (Respondents' Opp. at 13-14; U.S. Opp. at 9) are immaterial to the central issue decided in *Knight* raised here: When a bidder makes payments in connection with its bid for estate assets to a crucial stakeholder in the case instead of to the estate, are the funds

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7. For the same reason, the United States' efforts to distinguish *In re A. H. Robins Co.*, 832 F.2d 299 (1987), *cert. denied*, 485 U.S. 962 (1988), are unavailing. Only if it is assumed, contrary to the express holding of *Knight*, that these payments by a bidder are not property of the estate can SWEPCO's payment be reconciled with the prohibited payments in *Robins*.

paid directly by the bidder to the stakeholder still considered property of the estate?[8]

The SWEPCO Respondents admit that the bankruptcy court found that the SWEPCO witness had "testified that the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan" (Respondents' Opp. at 4), the plan which incorporated the SWEPCO bid. Thus, the SWEPCO Respondents admit that the payment was made in connection with and to further the SWEPCO bid.

The United States concedes that it "shares petitioners' concerns about the secretive payments that Southwestern made only to certain bankruptcy creditors who also happened to be the gatekeepers to Cajun's primary assets (the all-requirements power contracts)." (U.S. Opp. at 7.) It, too, admits the crucial facts needed for the application of *Knight*: payments by a bidder to creditors who are "gatekeepers to Cajun's primary asset." *Id.*

## IV.

## NO REVIEW OF FACTUAL FINDINGS IS SOUGHT.

Both the SWEPCO Respondents and the United States erroneously argue that Petitioners seek review of factual findings of the lower courts. Although disagreeing with certain findings in this case, Petitioners seek certiorari solely on two discrete legal issues (the absolute priority rule and the property of the estate issues) that were wrongly decided

8. That *Knight* was a criminal case does not distinguish it because the issue of whether a payment made directly from a bidder to a stakeholder in the case is property of the estate is a question of bankruptcy law, not criminal law. The fact that this bankruptcy law question arose in consideration of a criminal conviction does not lessen its precedential effect.

by the lower court, irrespective of the facts found. Further, although SWEPCO Respondents attempt to cloud the issues by alleging the relevance of "specific factual circumstances" in this "unique" case (Respondents' Opp. at 16), none of the cited facts is relevant to the discrete legal issues raised by Petitioners. There are no special rules that apply to cooperatives in bankruptcy, nor does the status of "plan proponent" (which under 11 U.S.C. § 1121 can be any "party in interest") afford any special rights or exceptions to the rules.[9]

## CONCLUSION

As the United States candidly admits, "it is not conducive to the proper functioning of the bankruptcy process for plan proponents to make payments to interested stakeholders." (U.S. Opp. at 7-8.) Yet, such payments were made in this case which were inimical to the "proper functioning of the bankruptcy process." This case is about proper control of the bankruptcy process through parties' adherence to prior rulings of this Court. It is about preventing equity holders from using their leverage to receive property ahead of creditors. The writ of certiorari should be granted.

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9. Indeed, if the rule were otherwise, bidders could solicit favored creditors or equity holders as co-plan proponents in order to circumvent the Bankruptcy Code's distribution scheme.

Respectfully submitted,

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